THE PLACE OF ENGLISH LEGAL HISTORY IN THE EDUCATION OF ENGLISH LAWYERS.[1]

The nineteenth century is notable as the century of the Renaissance of historical study. New materials and new methods have seconded the new intellectual point of view which demands to know something of the origin and growth and environment of an institution, a belief, or an idea before passing judgment upon it. Thus almost all departments of knowledge have been treated historically with more or less completeness. The one great exception, which the historian of our age will note with surprise, is the law of England. There are excellent histories of Roman law, of Roman-Dutch law, of French law, of German law. But no complete history of English law has ever yet been written; and the list of the partial and fragmentary histories which have been attempted at different periods is very scanty.

Hale's history of the common law, written in the latter part of the seventeenth century and first printed in 1713, is an able sketch, but it is only a sketch of the history of English law down to the middle of the seventeenth century. The four volumes of Reeves, written at the end of the eighteenth and the beginning of the nineteenth centuries, terminate with the end of Elizabeth's reign. Though the author's style, and the almost exclusively technical point of view which he adopts, make them unreadable for all but the most determined, they are a creditable performance for the period at which they were written; and they are useful even now if used with discrimination. But, it is hardly necessary to say that they are far removed from what a history of English law could be and ought to be at this period. Moreover they are spoiled, I might almost say rendered dangerous to the student, by the labors of Mr. Finlason, the editor of the edition published in 1869. The two volumes of Pollock and Maitland show us how such a history might be written. The inestimable services which their work has already rendered both to lawyers and historians is but an earnest of the benefit which would have accrued to the study of law and history if it had been completed by the one English lawyer whose

[1] An inaugural lecture delivered on October 22, 1910, at All Souls College, Oxford, by W. S. Holdsworth, D. C. L., All Souls Reader in English Law in the University of Oxford.

historical reputation was European. But though we must be duly thankful for what we have got, both we and many who come after us will regret that it does little more than lay the foundation for the work of some historian of the future. For the rest we have histories of legal institutions, and histories of certain branches of the law which touch upon constitutional development; we have in Stephen's history of the criminal law, the history of a single branch of English law; we have in Mr. Justice O. W. Holmes' book on the common law, a history of certain branches of the common law, and in Thayer's book on evidence the last word on the history of the jury; we have in the introduction to some of the volumes of the Selden Society, and in other periodicals many valuable essays on various special topics, many of which are usefully collected in the Essays on Anglo-American law;—but we have no history of the law as a whole written by a competent lawyer who is also a competent historian.

This being the state of the literature of English legal history, it is not surprising to find that it holds a very unimportant place in the subjects prescribed for students who wish to take a law degree or to enter the profession of the law. At Oxford it shares a paper with constitutional law in the Final Honor School. It has recently been made an optional special subject for the B. C. L. examination; but no candidate has as yet selected it. It has no special weight in the examination for the Vinerian law scholarship. By the Council of Legal Education it is treated in a manner substantially similar to that in which it is treated in the Final Honor School at Oxford. At Cambridge there is a paper on constitutional law and history in Part I of the Law Tripos; and in Part II questions are set upon the history of all those branches of legal doctrine which are required for the examination. Though there is no paper in legal history, a candidate is clearly required to know quite as much, if not more legal history, than at Oxford; and its study is encouraged by the Yorke Prize Essay. At London constitutional law and its history is prescribed for the intermediate examination for the L.L.B. degree. General legal history used to be a prescribed subject in the final examination for that degree; but it is now only an optional subject. The Law Society does not prescribe it as a separate subject. Thus it appears to be thought sufficient to require students to know something of the history of English legal institutions, and just so many scraps of the history of legal doctrine as will explain those features in modern law which

would be otherwise inexplicable. And yet the branches of the law which all these bodies prescribe for examination—real property, torts, contracts, equity, criminal law—are all old branches of law, and therefore incapable of being thoroughly understood without some knowledge of the general history of the law.

If we were not familiarized by long use with the absence of any complete history of English law, and with the absence of general legal history from the list of subjects in which the law student must satisfy his examiners, we should regard these two facts as a very curious phenomenon. How curious it is can easily be seen if we glance for a moment at the importance of a knowledge of the history of English law in the first place to the English historian and in the second place to the English lawyer.

(1) It can hardly be disputed that some knowledge of the history of a nation's law is needed to understand fully that nation's history. In the laws of a nation we get its considered determinations upon all those parts of the national life which it deems advisable to regulate. They are the best evidence of its ideas at any given period upon such matters as the forms and modes of its government, upon its attitude to religion, upon its economic ideas, upon its social structure, upon its views as to proprietary relations of its members to itself and *inter se*. In any age the historian of all or any of these sides of national life is brought up against the law—it may be in the form of a statute, it may be in the form of books of authority, it may be in the form of judicial decisions; and unless he knows something of the general history of the legal system as a whole he may easily be deceived as to its bearing or importance. "It is impossible," said the future Lord Cairns to the Commissioners appointed to inquire into the arrangements made by the Inns of Court for promoting the study of the law, "it is impossible for anyone to be proficient in Roman history who does not understand the history of the civil law. If Gibbon had written his history without a large and explanatory discourse on the civil law, it would have been a very imperfect book."[2] Legal history in fact sheds a brilliant light upon all sides of the national life. The light is shed, it is true, from a single and that a technical standpoint. But it is an important standpoint; for if legal rules reflect the general course and the general tendencies of national life, these legal rules, when firmly established, give a permanent concrete shape to these tendencies, and, thus, in the long run, have

[2]Report of the Commission on the Inns of Court (1855) 138.

had no small share in the creation of distinct national characteristics.

Let us take one or two obvious illustrations from our own history which will show us that a "large explanatory discourse" on the common law would elucidate many dark places in our constitutional history. We must know something of the manner in which ideas drawn from the civil and canon law shaped the political theory of Western Europe if we are to understand the mediæval history of this or of any other Western European country; while we must know also something of the manner in which the English common law shaped the institutions and ideas of a feudal state if we are to understand the peculiarities of English mediæval constitutional history. We must know something of the strength and the weakness of the mediæval common law if, in the Tudor period, we are to understand why in England alone Parliament did not go down before the increasing power of the crown, why it was necessary to create many new courts and councils, and why the old machinery of law and government was able to hold its own against them. In the Stuart period we must know enough law to reargue those famous cases in constitutional law in which the claims of Parliament and Prerogative were fought out, if we are to understand the manner in which the great constitutional questions of the seventeenth century presented themselves to the men of that age. For the eighteenth century we may remember the words of Seeley to the effect that the expansion of England in the New World and in Asia is the formula which sums up for England the history of that century. We shall assuredly miss the reason why the English nation alone of European nations colonized successfully unless we bear in mind the manner in which the common law fostered the virtues of self-help, self-reliance, and self-government, teaching the individual to depend little on the state and much on himself. For the nineteenth century it is hardly necessary to speak; for the late Vinerian professor—the only holder of the chair in whom Blackstone has found his peer—has clearly explained the intimacy of the relations between the law of England and its general history.

(2) But if a knowledge of legal history is necessary to the English historian, still more is it necessary to the English lawyer. Even if English law were entirely codified it would still be necessary to know something about its history. In the compilation of the Digest of English Civil Law which a few of us here are pro-

ducing under the energetic editorship of Mr. Jenks we find that a constant recourse to legal history is necessary; and a similar recourse will clearly be necessary to those students who wish to understand the whole import of some of those short propositions in which we have endeavoured to state the law. But the whole of English law is not yet codified; and, in its present uncodified state, it is no exaggeration to say that it has been necessary to make a careful study of particular topics in legal history in order to arrive at a decision in some of the most important of our leading cases in all branches of the law.[3] Some cases, indeed, it would be safe to say would have been differently decided if the judges had possessed a greater knowledge of legal history—*The Queen* v. *Millis*,[4] and *Beamish* v. *Beamish*[5] are classical illustrations. With regard to certain peerage cases the evil results of the ignorance of legal history upon the law and the lawyers have been recently denounced by one whose exact knowledge of the best evidence for historical facts is only equalled by his power of denouncing its absence in others. Mr. Round[6] says:—

"It was not long ago that a learned judge, in the course of addressing a medical gathering, observed that there was this in common between their profession and his own: they both made sure of their facts before forming their conclusions. Now that is precisely what in my experience, lawyers dealing with the facts of history resolutely decline to do. * * * The historian tests his foundations before he rears his structure. * * * To one who has been trained in these methods * * * his first experience of the lawyers' ways must come surely as a shock; science is exchanged for superstition. * * * What is of most matter in the law is not to learn what the facts were, but what some bygone judge or writer supposed the facts had been. He will gaze in wonder on great intellects bowing themselves in homage before the blunders of the past, acute minds submitting to the fetish worship of 'our books,' and helpless in the presence of what I have termed 'the long ju-ju of the law'—to such criticism have the lawyers exposed themselves by their neglect of legal history!"

I might be content to simply copy Mr. Round's words seeing that they put my case far more forcibly than I could put it. But

[3] *Constitutional Law:*—Thomas *v.* The Queen (1874) L. R. 10 Q. B. 31. *Torts:*—The Winkfield [1902] P. 42; Allen *v.* Flood [1898] A. C. 1. *Contracts:*—Nordenfelt *v.* Maxim Nordenfelt Co. [1894] A. C. 535; [1893] 1 Ch. 630. *Real Property:*—Foxwell *v.* Van Grutten [1897] A. C. 658; Dalton *v.* Angus L. R. (1881) 6 A. C. 740.

[4] (1843) 10 Cl. & Fin. 534.

[5] (1862) 9 H. L. C. 274; and *cf.* the note on both these cases in P. & M., II, 370.

[6] Peerage & Pedigree, I, 104, 105.

in fairness to my brother lawyers I must confess I think that, though there is much truth in what he says, he puts his case a little too high; and, as my case is a strong one, I do not wish to injure it by overstatement. It seems to me that Mr. Round has omitted to give the weight to two essential conditions of the lawyer's art. In the first place lawyers are concerned primarily with deciding present disputes, and only secondarily in extricating the facts of history. They must decide these disputes as quickly as possible, using the best evidence they can get. In the second place they must follow the law laid down in past cases. They only have a free hand if there is no previous case precisely in point. We must as Coke says, "peruse our ancient authors, for out of the old fields must come the new corn."[7] If it were not so, the law would be wholly uncertain; and for certainty in the law a little bad history is not too high a price to pay. If historians were similarly situated—if *e. g.* Mr. Round were obliged to start by accepting all the late Professor Freeman's conclusions as well as the conclusions of others of our more ancient chroniclers, and could not urge his new conclusions unless he could show that he was dealing with events which none of his predecessors had dealt with, we imagine that "the ju-ju" of history would equal that of the law in length, and would probably exceed it in acrimony. At the same time Mr. Round is quite right in insisting that the lawyers should acquire more accurate historical knowledge. If certain erroneous decisions arrived at in the past for lack of that knowledge are now stereotyped in the law, the lawyers can at least avoid similar errors in the decision of new cases, by learning what historical evidence is, where it can be sought, and how it should be applied.

Why then have historians and lawyers alike acquiesced so long in the prevailing ignorance of the history of English law? The answer is I think to be found in the peculiar history of the education of the English lawyer. That history possesses what in this country is a striking peculiarity—it has no continuity. There was efficient legal education in the fourteenth, fifteenth, sixteenth, and the first half of the seventeenth centuries. In the course of the nineteenth century the system of legal education which we know and practice, sprang up. But the two periods are separated by a dark age in which English law was not taught at all.

As to the system of legal education pursued in the earlier pe-

[7] 4 Inst. 109.

riod—the readings, the moots, the exercises and the attendance upon the courts—I do not intend to add anything to what I have said elsewhere.[8] It was a system which gave an intensely practical and professional education. It was eminently suited to the needs of a youthful system of law, the literature of which was as yet of a manageable size. It was perhaps the only system possible for an age in which there were no printed books. When Coke wrote his Institutes there were plenty of printed books; and "timely and orderly reading" was as much an essential part of the student's education as the practice of moots and attendance upon readings and at the courts.[9] This is illustrated by the fact that from about this period increased attention was paid by the various Inns of Court to their libraries.[10] But even at the latter part of Coke's life the old system was beginning to show signs of decay. In spite of the efforts of the judges,[11] and the orders of the Inns of Court, it seems to have become gradually more difficult to secure the services of Readers; and the quality of the Readings fell off—Coke calls the modern Readings "obscure and dark."[12] The whole system collapsed during the period of the Great Rebellion. After the Restoration some attempts were made to revive it. Orders were issued by the judges in 1664,[13] and the Inns of Court made some attempt to carry them out.[14] It would appear that at Lincoln's Inn there was a party among the Benchers in favor of this revival. But it succumbed to its opponents in 1677.[15] In fact during the whole of the second half of the seventeenth century less and less importance was coming to be attached to the educational side of the Reader's duties, and more and more to their social side. Readings were diminishing both in length[16] and in numbers; but the extravagance of the Reader's feasts increased

[8]History of English Law, II, 426, 427.

[9]Co. Litt. 70b.

[10]Pension Book, Gray's Inn, xlix; in 1629 the barristers and students of Lincoln's Inn petitioned that the library might be made more convenient for them, Black Books, II, 290, 291; in 1631 general orders were made for the library, *ibid.* 299; in the Middle Temple the library dates from 1641, A. R. Ingpen, K. C., Master Worsley's Book 107.

[11]General Orders were issued in 1591, Black Books of Lincoln's Inn, II, 20; in 1593-4, *ibid.* 31; in 1596, *ibid.* 47; in 1604, *ibid.* 81; in 1614, *ibid.* 440; in 1627-8, *ibid.* 451; and in 1630, *ibid.* 454.

[12]Co. Litt. 280b.

[13]Black Books of Lincoln's Inn, III, 445-449.

[14]*Infra*, p. 732, n. 31.

[15]*Ibid.* III, xi-xiv.

[16]Black Books of Lincoln's Inn, III, 10, 12—the Reading is to last one week only.

to such a pitch that in 1678 the king interfered.[17] By the end of the century the whole of the old system of legal education had collapsed. If any Readers were appointed, they were not expected to read.[18] In theory the student's exercises continued. But their theoretical existence was merely an excuse for levying certain fixed payments for failure to perform them.[19] "For the Common Law," said Roger North,[20] "there are Societies which have the outward show or pretence of collegiate institutions; yet in reality nothing of that sort is now to be found in them; and whereas, in more ancient times, there were exercises used in the Hall, they were more for probation than institution; now even these are shrunk into mere forms, and that preserved only for conformity to rules, that gentlemen by tale of appearances in exercises rather than any sort of performances, might be entitled to be called to the Bar." What these exercises had become in the nineteenth century Mr. Whateley, *Q. C.*, told the Inns of Court Commissioners in 1855:—"When I was a student," he said,[21] "I used to be marched up to the barristers' table with a paper in my hand, and I said, 'I hold the widow.'—The barrister made a bow and I went away; and the next man said, 'I hold the widow shall not' —and the barrister made a bow and he went off; and that was the remnant of performing the exercises." The exercises performed at the Benchers' table seem to have been of a precisely similar character—the widow did duty on both occasions.[22] The residence of members, once sternly insisted on, because obviously necessary to the efficiency of the old system of legal education, could, like the performance of exercises, be compounded for;[23]

[17]For the Readers' Feasts see Dugdale, Orig. Jurid. 206; in 1678 the king orders that no Reader not being a K. C. or the Recorder of London should spend more than £300 on his Reading; Black Books of Lincoln's Inn, III, 120.

[18]The last Reader appointed in Lincoln's Inn was appointed in 1677 and the last Reading took place in 1680; Black Books, III, xiv, iv, vi; in the Middle Temple they continued to be appointed, but the last Reader who read was Sir W. Whitelock in 1684, Ingpen, Master Worsley's Book 125; at New Inn there was a Reading on the Statute of Uses, slight in character, as late as 1691, Collectanea Juridica, I, 369; *cf.* Pension Book, Gray's Inn 445, 446, 457, and n. 4.

[19]Ingpen, Master Worsley's Book 136: "It is now usual when a gentleman hath failed, and been fined for so doing, to account his exercise over, he being no more called to that exercise;" see *ibid.* 211 n. and 212 for the amounts payable; and *cf.* Black Books of Lincoln's Inn, III, 85.

[20]Cited Ingpen, Introd. to Master Worsley's Book 45.

[21]Evidence, p. 54.

[22]Black Books of Lincoln's Inn, IV, V, 2.

[23]Ingpen, Master Worsley's Book, 143, 144, 210; Black Books of Lincoln's Inn, III, xix, 287.

and, in the nineteenth century, it has survived only in the liability to keep a fixed number of terms by consuming a fixed number of dinners.[24]

With the disappearance of the old system of legal education disappeared the whole apparatus of the public teaching of English law; for, from the earliest period in our history, the Universities had abandoned this subject to the Inns of Court.[25] It is clear from the preface to Rolle's Abridgment, written by Sir Matthew Hale at the end of the seventeenth century, and from a letter written at the beginning of the eighteenth century by Sir Thomas Reeve, Chief Justice of the Common Pleas, to his nephew,[26] that the student must rely upon his own reading for information upon the general principles of the law; and, as Bacon had said,[27] there was no really good institutional book which he could read. He must make shift with such books as Coke upon Littleton, the Doctor and Student, and the Abridgments. The study of these books, attendance upon the courts,[28] and reading in chambers were the only methods of gaining instruction in the law of England from the last part of the seventeenth century to the last half of the nineteenth century.[29]

The causes of this disastrous state of things were mainly two. In the first place the printed book seemed to provide a short cut to knowledge, and led both the students and their teachers to acquiesce in the abandonment of a laborious system of education. The students were not sorry to be relieved of their exercises. The barristers, especially the more senior barristers upon whom

[24]The modern conditions of call were in substance fixed in 1762 by an agreement between the four Inns of Court. Black Books of Lincoln's Inn, III, 374, 375.

[25]Holdsworth, History of English Law, II, 415.

[26]Both these are printed in Collectanea Juridica, I, 79, 263; *cf.* the course suggested by Roger North, Discourse on the Study of the Law 41.

[27]A Proposal for Amending the Laws of England, Works, IV, 372: "For the Institutions, I know well there be books of introductions, wherewith students begin, of good worth, especially Littleton and Fitzherbert's *Natura Brevium:* but they are no ways of the nature of an institution; the office whereof is to be a key and general preparation to the reading of the course."

[28]From the earliest times right down to the nineteenth century places in court were reserved for the students, and judges would sometimes explain to them the gist of the proceedings or the points of law which were being discussed; for the period of the Year Books see Y. B 1, 2 Ed. II (S. S.) XV and n. 2; 2, 3 Ed. II (S. S.) XV, XVI; 3, 4 Ed. II (S. S.) XLI, XLII; for 18th and 19th centuries see Campell, Lives of the Chief Justices, II, 329 and note.

[29]See generally Ingpen, Master Worsley's Book 43-50.

as benchers the maintenance of the system depended, were not sorry to be relieved of obligations which interfered with their practice.[30] The old system needed the willing co-operation of students, barristers and benchers. All now desired to see the end of it. In 1661 the Masters of the Bench at Lincoln's Inn stated, "That expresse informacion hath bin made (which they are unwilling to believe) that there is a consent and combinacion interteined and owned by some at least of the gentlemen of the barr to abett and justify such defaults as have already bin made, and to encourage and countenance the like for the future."[31]

There is nothing like a robust faith in the non-existence of facts which we do not wish to see. But the "expresse informacion" should not have been so very difficult of belief, seeing that in 1664 it was necessary to pass a rule threatening any Bencher who declined to read with the loss of his seat on the Bench.[32]

In the second place the life of the lawyers in their Inns was too self-centered, and too isolated. We whose studies are apt to suffer from the opposite defect—from a continual discussion of far-reaching projects of reform urged upon us by writers in the press, and by members of our own body—may envy the academic calm of the eighteenth century. But in truth that century suffered from the defect of too little outside interference, as we perhaps suffer from the defect of too much. Robert Lowe hit the nail on the head, when he told the Inns of Court commissioners that the Inns of Court as at present constituted were a University in a state of decay. "They are," he said, "in the same position, as I understand it, as the University of Oxford was at the end of the last century, when the University had virtually delegated the power of conferring a degree on the Colleges, the consequence of which was that the Colleges, whether from competition among themselves, or having no sufficient motive had brought the thing down to the very lowest point."[33]

As the law became more complex, the difficulties of the law student increased. They were perhaps at their worst in the first

[30]At Lincoln's Inn in 1605 the Reader elect said that he had made some progress in his Reading, but "protested that he coulde not goe throughe and finishe the same to Reade this sommer withoute refrayninge and loseinge a greate parte of his practize this presente terme and the nexte allso." Black Books, II, 87.

[31]*Ibid.*, III, 8; for other orders attempting to restore the old system see *ibid.*, 10, 12, 20, 32, 36, 60, 61.

[32]*Ibid.*, III, 40.

[33]Evidence, p. 135.

half of the nineteenth century, for he was left to get what instruction he could from his own reading; and there was but little he could read.[34] His older advisers contemplated his covering the whole body of the law. He should be "furnished," as Coke put it, "with the whole course of the law."[35] But this had become plainly impossible with the growth in the bulk and complexity of the law. He had, indeed, Blackstone's Commentaries; but he had little else. He was left to grope his way unassisted amidst the statutes, the reports, and large treatises wholly unsuited to his needs. We have a description of the position of a law student of the sixteenth century, when the old system of legal education was in its prime, and of his position in the nineteenth century, which had fallen into utter decay, from two equally competent eye-witnesses. In the sixteenth century Sir Thomas Smith tells us that he has such admiration for the conciseness of statement, the skill in argument, the logical force, the copious and polished eloquence of the Londinenses Jurisconsulti, that he intends to take a long vacation in London in order to have the pleasure of hearing them dispute together in their schools.[36] In the nineteenth century Lord Bowen says:[37]

"I well recollect the dreary days with which my own experience of the law began in the chambers of a once famous Lincoln's Inn conveyancer; the gloom of a London atmosphere without, the whitewashed misery of the pupils' room within—both rendered more emphatic by what appeared to us to be the hopeless dinginess of the occupations of the inhabitants. There stood all our dismal text books in rows—the endless Acts of Parliament, the cases and the authorities, the piles of forms and of precedents—calculated to extinguish all desire of knowledge even in the most thirsty soul. To use the language of the sacred text it seemed a dry and barren land in which no water was. And, with all this, no adequate method of study, no sound and intelligent principle upon which to collect and to assort our information."

The remote germs of our modern system of legal education must be sought in the apprehensions of that prince of jobbers, the Duke of Newcastle, and in the suggestion of a Solicitor General to a Fellow of All Souls. The Solicitor General, Sir William Murray

[34]See Dicey, Blackstone's Commentaries, 54 National Review 671 (Dec., 1909).

[35]Co. Litt. 70a; *cf.* authorities cited above, p. 731, n. 26.

[36]Extract from Smith's inaugural oration, cited Maitland, English Law and the Renaissance 90.

[37]Address to the Birmingham Law Students Society, 1888, cited Cunningham, Life of Lord Bowen 76, 77.

(the future Lord Mansfield), had perceived in Blackstone, a prominent fellow of All Souls, the making of a great teacher; and in 1752 he had recommended the Duke of Newcastle to appoint him to the chair of civil law in the University which was then vacant. The Duke, not being sufficiently assured of Blackstone's political support, declined to appoint him. Thereupon Murray advised Blackstone to break new ground by giving lectures on English law at Oxford. The wisdom of this advice was abundantly justified. Blackstone's lectures led to the foundation of the Vinerian chair at the University; and the foundation of that chair was the beginning of a new system of legal education. But of Blackstone and of Blackstone's work I need say little, after the lecture which the late Vinerian Professor gave last year. Blackstone rightly condemned the system under which the student was expected, "by a tedious lonely process to extract the theory of the law from a mass of undigested learning." He pointed out that it was a mistake to suppose a knowledge of practice was all that was useful to a lawyer—"if practice be the whole he is taught, practice must also be the whole he will ever know;" and he concluded that, the previous foundations of legal science should, like those of any other science, be laid in one of our learned universities. His own lectures showed the manner in which the learned universities might encourage the study of English law; and these lectures when published as the Commentaries on the laws of England were, to use the words of Bacon, the first book "of the nature of an institution" that the law of England had yet possessed; for they were the first book on English law, the primary aim of which was "to be a key and general preparation to the reading of the course." In the New World his words and his example met with a readier response than in his own country. It must indeed be admitted that the reverence of our American cousins for our common law has exceeded our own; for it has borne practical fruit not only in the elucidation of many dark places in its history, but also in the construction of an original method of legal education which combines the strong features of the old system and the new.[38] In this country, for reasons which the late Vinerian Professor has clearly pointed out, his voice was the voice of one crying in the wilder-

[38]Thayer, The Teaching of English Law at Universities, 9 Harv. L. Rev. 169-184. Thayer could say with perfect justice in 1895 (*ibid.* 169, 170), "We, in America, have carried legal education much farther than it has gone in England. There the systematic teaching of law in schools is but faintly developed."

ness. In 1795 Mr. Nolan, a barrister of Lincoln's Inn, in a letter to the Benchers proposing to establish an annual lectureship upon law and equity, justly pointed out that:

"Corporate regulations are imposed upon those who wish to become lawyers, and degrees are conferred entitling them to practice, but no person is appointed to deliver that instruction to students on account of which these restrictions were originally imposed."[39]

The proposal of James Mackintosh to deliver a set of lectures in Lincoln's Inn Hall on the law of Nature and of Nations was with difficulty granted;[40] and a proposal of Lord Brougham's in 1845 that Lincoln's Inn should establish an annual course of lectures on jurisprudence and the civil law, and that the other Inns should be invited to establish lectures on common law, equity and conveyancing, was adjourned.[41] It was not till nearly a century after Blackstone lectured and wrote that any attempt was seriously made to realize his ideal. It was nearly eighty years before there were even faint glimmerings of the dawn.

In 1833 the Inner Temple created two lectureships; but the attendance was small and they ceased after two years. In 1847 the Inner Temple established a lectureship in common law, and the Middle Temple lectureships in jurisprudence and civil law; and in the same year Gray's Inn established courses of lectureships, moots, and voluntary examinations. In 1851 the Inns of Court established the Council of Legal Education to give lectures and classes; and a call to the bar was made conditional either on passing an examination, or on attending a certain number of lectures.[42] The inadequacy of these measures was patent to the Inns of Court Commissioners who reported in 1855 that, "as regards intellectual qualifications and the professional knowledge of a barrister there was no such security as the community is entitled to require,"[43] and that we were behind every other European country in this respect.[44] They recommended, among other things a compulsory examination;[45] but it was not till 1872 that this recommendation was carried into effect.

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[39]Black Books, IV, 66.

[40]*Ibid.* 76.

[41]Black Books, IV, 229.

[42]Report, p. 13; Black Books of Lincoln's Inn, IV, VI, VII; Ingpen, Master Worsley's Book 48-50.

[43]Report, p. 14.

[44]*Ibid.*, pp. 10, 11.

[45]*Ibid.*, pp. 17-19.

Long before this, however, the new system of lectures and examinations was well on the way. The "Society of Attorneys, Solicitors, Proctors, and others not being barristers practising in the courts of Law and Equity of the United Kingdom," now called the Law Society, had been incorporated in 1831; and in 1833 it had established a system of lectures and a compulsory examination. By the middle of the century the Universities had begun to follow the path which Blackstone had pointed out. At Oxford the examination for the B. C. L. degree was started in 1852, and the Honor School of Law and History in 1853. Law and History were, if we may use the metaphor, judicially separated, but not completely divorced in 1872, when our modern Honor School of Jurisprudence came into being. At Cambridge the Law Tripos issued its first class list in 1858. When the Society of Public Teachers of Law was formed in 1908 there were found to be besides the Inns of Court and the Law Society, no less than eight Universities teaching, lecturing upon, examining in, and giving degrees in English law.[46] We may fairly say, therefore, that the new system of legal education has been established; and the reproach that there was no teaching of English law—a reproach which had lasted for nearly two hundred years—has been at length removed.

Now I think that this curious history explains to us why the history of English law has never been written and never been taught in any systematic fashion. In the earlier period, when it was possible and necessary to study the whole literature of the law, the lawyers acquired a knowledge of legal history sufficient for their professional work together with their law. But, as Professor Maitland has pointed out, this system of legal education could not lead to the production of any great work upon the history of English law.[47]

"History involves comparison, and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history."

Then in the later period the peculiar difficulties attending the study of English law rendered it a sealed book to all but the lawyers; and thus we get that peculiarity, noted by Maine,[48] that, while "Frenchmen, Swiss and Germans of a very humble order have a

[46]In the United States there were in 1895 some seventy-five law schools. Thayer, The Teaching of English Law at Universities, 9 Harv. L. Rev. 173.

[47]Why the History of English Law is not Written, 11.

[48]Village Communities 59, 60.

very fair practical knowledge of the law which regulates their every day life," we consider that, "law belongs as much to the class of exclusively professional subjects as the practice of anatomy." Those qualified to write history knew no law; while the trained lawyer, even if he was acquainted with other systems than his own, had learned and studied law, not scientifically, but empirically in chambers with a view to professional practice. Lawyers trained after this fashion, who could devote but a few occasional hours from more absorbing professional pursuits to the needs of the student, were not persons who would be likely to appreciate the importance of legal history in the education of the lawyer; for they had never taught law, nor had they studied it from the point of view of the teacher.

But in the Society of Public Teachers of Law we can see that a new school of lawyers has arisen who make it the business of their lives to teach and study law scientifically; and it is not too much to hope that their united experience may effect some necessary reforms. At the beginning of this lecture I have tried to give some reasons for my claim that a reconsideration of the position of the history of English law in the legal curriculum is of all the needed reforms the most pressing; and, in conclusion, I should like to make one or two suggestions as to what that position should be.

In the first place the history of legal institutions, *i. e.* the history of the courts and their jurisdiction, should be taught at the very beginning of the student's course. To judge from olden tracts like the *Articuli ad novas narrationes* and the *Diversité des Courtes* this has from early days been considered a necessary branch of elementary knowledge.[49] It should therefore be a part of the first examination; and it could easily and naturally be combined with constitutional law and its history. In this way the student will get some idea (1) of the form and mechanism of the state, the law of which he is about to learn, and (2) of the judicial machinery by which that law has been built up. He will learn the meaning of some of the most fundamental divisions of that law—the divisions between common law, and equity, and ecclesiastical law, and admiralty law. He will understand the reason why there are various divisions of the supreme court, and the principle upon which the judicial work of the state is assigned to these various divisions.

[49]For these tracts see Holdsworth, History of English Law, II, 442, 443.

In the second place the general outlines of the history of the law should be made part of the final examination. This must be made part of the final examination because it is impossible to deal adequately with the history of a technical subject till its outlines have been mastered—a fact of which Coke had some perception when he advised the student to read first the more recent and then the earlier cases.[50] This subject should be treated in two parts. The first part should contain a general account of the chief epochs in the history of the law in relation to the general history of England, together with an account of the literature and sources of the law; and the second part, the history of those branches of legal doctrine which form part of the examination. Further, the student should be required to show his capacity to read the two languages in which the earlier records of the law are written—Latin and Law French. The acquisition of a body of knowledge of this kind would be both of scientific and of practical value. It would be of scientific value because it would teach the student the manner in which the law is shaped and developed by the changing needs and ideas of different ages, and conversely, the extent to which the law has helped to shape these needs and ideas; it would teach him at once the permanence and adaptability of legal rules; it would teach him that apparently meaningless technicalities once had a meaning, and perhaps still possess more meaning than may at first sight appear;[51] it would teach him the delicacy and difficulty of making successful legislative changes in an old system of law, and, if it is necessary to make some changes, it would the better equip him for the task. It would be of practical value because the student, when he comes to the practical work of his profession, would know something of the authorities which he is constantly using. It would help him to read old books and old reports intelligently. It would put him on inquiry for better evidence if these old books and old reports seemed to be telling impossible tales, or laying down inexplicable law. It would give him a clue to a right conclusion if, seeking authority, he is obliged to wander further and further away from his modern cases, and is even driven to plunge into the Year Books; for it

[50] Co. Litt. 249b.

[51] "The dullest topics kindle when touched with the light of historical research, and the most recondite and technical fall into the order of common experience and rational thought." Thayer, The Teaching of English Law at Universities, 9 Harv. L. Rev. 178, 179.

would teach him what parts of the old law were clearly obsolete, and where he might hope to get some light upon a modern case.

The outlines of such knowledge must be acquired if at all in the lawyer's student days. If these outlines are then acquired they can and will be added to in later years; for historical methods and historical evidence will be familiar things, and the history of the law will not be a sealed book written in an unknown tongue. This knowledge if thus generally taught, will come to be recognized by the profession as the basis of a scientific knowledge of the law; and our successors will look back to the days when the lawyer was not expected to possess it, and had no adequate means of acquiring it, with as much wonder as we now look back to the days when there was no teaching of the principles of English law.

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